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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 422

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLEES.

ELMER A. SMITH,
A. B. ENOCH,
M. G. ROBERTS,
W. A. COLE,
BRONSON JEWELL,
M. CARTER HALL,
JOHN F. CONNORS,
A. H. KISKADDON,
JAMES STILLWELL,
D. P. CONNELL,
HERBERT S. HARR,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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OCTOBER TERM, A. D. 1933.

No. 422

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLEES.

OPENING STATEMENT.

The United States District Court for the District of Delaware by its final decree filed June 26, 1933, set aside and annulled an order of the Interstate Commerce Commission entered December 10, 1932, in the proceeding entitled *Ex Parte No. 102, Application of American Barge Line Company*, upon the grounds that said order was made without according to appellees, thirty-one common carriers by railroad subject to the Interstate Commerce Act, a full and fair hearing, and that Section 3(e) of the Inland Waterways Corporation Act of June

8, 1924, as amended, Section 153(e), Chapter 5, Title 49, United States Code Annotated (attached as an appendix hereto), in so far as it authorized the Commission to so make and enforce such order against appellees without such hearing, was unconstitutional in that it deprived appellees of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and constituted a delegation to the Commission of pure legislative power contrary to Article I, Sec. 1, of the Constitution of the United States. The opinion of the District Court appears in the record herein at pages 117-127, and is reported in 3 F. Sup. 1005.

The order of the Commission of December 10, 1932, so set aside and annulled by the court below was one requiring the common carrier railroad connections of the American Barge Line Company at Memphis, Tennessee, and Pittsburgh, Pennsylvania, to participate with that company in joint through rail-barge-rail and barge-rail rates and routes on cotton, in carloads, from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island and Connecticut, the water haul by barge in each case being on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania.

The briefs on behalf of the principal appellants, the United States and the Interstate Commerce Commission, concede the constitutional requirement for a full and fair hearing before an order of the Interstate Commerce Commission fixing maximum rates is enforced against a carrier subject to the Interstate Commerce Act. The briefs of intervening appellants, American Barge Line Company, Mississippi Valley Barge Line Company,

Mississippi Valley Association, and Inland Waterways Corporation, substantially make the same concession.

All of the appellants, however, contend that appellees here and plaintiffs below might have secured a hearing before the Interstate Commerce Commission as to the reasonableness of the rates which they were required to establish prior to the enforcement of such rates, and, further, that said order of the Interstate Commerce Commission did not affect any substantial legal interest of appellees.

The contentions of appellants, however, are without foundation. Appellees pursued their statutory remedies to their ultimate conclusion and only sought the protecting aegis of a Federal court of equity when their last petition for vacation of the Commission's order and for a hearing had been denied and they were faced with either compliance with the Commission's order or incurring of the severe penalties prescribed by the Interstate Commerce Act.

Nor is there merit to the latter of the above contentions of appellants. The order of the Commission complained upon was one made in the exercise of the maximum rate making power of the Interstate Commerce Commission and directly and affirmatively required, the rail connections of the American Barge Line Company appellees before this court to participate in joint maximum rail-barge-rail and rail-barge rates. Appellees would be substantially damaged by this order, and it was of the character that this court has frequently announced, must be founded upon due process of law.

The pertinent facts bearing upon this controversy as found by the court below are as follows:

"1. Plaintiffs (appellees) are common carriers by railroad subject to the Interstate Commerce Act,

and engage in the transportation of cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island and Connecticut.

"2. On August 29, 1932, plaintiffs and other railroad carriers, because of severe competition from unregulated truck and water carriers, established carload rates upon cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis substantially and materially lower than the any-quantity rates theretofore prevailing, and on November 16, 1932, plaintiffs and other railroad carriers further reduced said carload rates in the belief that such further reduction was necessary to meet the competition above referred to.

"3. By petitions dated October 31, 1932, and November 5, 1932, the American Barge Line Company applied to the Commission to enter an order requiring the railroads participating in the said carload cotton rates to participate with it in joint through rail-barge-rail and barge-rail carload rates from the same origins to the same destinations upon a basis lower than the all-rail carload rates. The natural and normal effect of such participation in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes.

"4. By petitions dated November 12, 1932, and November 14, 1932, the carriers operating both east and west of the Mississippi River, including plain-

tiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company, and represented to the Commission in their said petitions that without a full and fair hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not properly and justly determine the issues presented by such applications. The carriers by railroad further averred specifically that without such hearing the Commission would be without proper evidence to determine—

a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rates and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

"5. In neither the petitions of the American

Barge Line Company, dated October 31, 1932, and November 5, 1932, nor in the petitions or replies of the carriers dated November 12, 1932, and November 14, 1932, are there set forth any facts or evidence necessary to a determination by the Commission of the issues presented by the applications of the American Barge Line Company. The petitions of the American Barge Line Company substantially set forth solely the ultimate conclusion that the establishment of rail and water rates there requested was desirable and in the public interest, and the petitions or replies of the carriers set forth in substance only a denial of such ultimate conclusion and a prayer for a hearing.

"6. The Interstate Commerce Commission declined to grant to the railroad carriers a hearing as prayed in their petitions of November 12, 1932, and November 14, 1932, and without such hearing, on December 10, 1932, entered its said second supplemental report and order in *Ex Parte* 102, Application of American Barge Line Company, in which plaintiffs and certain other carriers by railroad named therein were required to join with the American Barge Line Company in establishing, on or before January 25, 1933, upon fifteen days' notice, joint rail-barge-rail rates on cotton, in carloads, from the origin territory to the destination territory above described, upon a basis 8, 6, and 4 cents lower than the all-rail rates between the same points, dependent upon the application of varying minimum weights.

"7. The said second supplemental order of the Commission was made without evidence to support it, and there is no record before the Commission which may be examined by a court if called upon to

determine the legality or validity of the Commission's order.

"8. By petitions dated December 30, 1932, and January 7, 1933, the southwestern carriers by railroad, plaintiffs herein, on their own behalf and on behalf of other carriers by railroad similarly situated, requested the Commission to vacate and set aside the said second supplemental order of December 10, 1932; to grant a reconsideration of all matters by the entire Commission; in connection with such reconsideration to afford said railroads a hearing prior to the effective date of any order; and to extend the effective date of said second supplemental order of December 10, 1932, in order to afford the Commission an opportunity to pass upon said petitions. The said petitions above referred to were denied by the Commission in its order of January 18, 1933.

"9. By appropriate orders of the Commission the said second supplemental order of the Commission of December 10, 1932, has been extended to become effective June 1, 1933, upon ten days' notice to the public.

"10. The said second supplemental order of the Commission will require the railroads serving the origin and destination territories involved to participate in joint through rail-barge-rail and barge-rail rates from points of origin in Arkansas and Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis 4, 6 and 8 cents lower than the corresponding all-rail rates between the same points, and to observe such rail-barge-rail and barge-rail rates so constructed as a maximum rate as long as plain-

tiffs maintain all-rail carload rates on cotton between the same points of origin and destination heretofore referred to.

"11. The said second supplemental order of the Commission of date December 10, 1932, if made effective, will require carriers by railroad whose lines serve the State of Arkansas to participate in joint rail-barge-rail rates on cotton, in carloads, from Arkansas to the destination territory heretofore described, substantially lower than contemporaneously in effect via the all-rail routes in which such carriers now participate. In addition, such order will require carriers by railroad whose lines extend from Arkansas points to the St. Louis gateway to deliver cotton to the barge line at Memphis, Tennessee, for transportation by water to Pittsburgh, Pennsylvania, in many instances short-hauling such carriers and depriving them of the full use of their lines of railroad.

"12. Such carriers would, in the event the cotton is delivered to the barge line at Memphis, Tennessee, receive less revenue than if such cotton were transported over all-rail routes to the St. Louis gateway and there delivered to eastern rail connections.

"13. Carriers by railroad, plaintiffs in this action, who operate lines of railroad extending from the St. Louis gateway to the destination territory heretofore described, would, as to cotton moving rail-barge-rail, if the order of the Commission referred to becomes effective, take such cotton at Pittsburgh, Pennsylvania, instead of at St. Louis, and would thereby be deprived of the use of their lines of railroad extending from the St. Louis gateway to Pittsburgh, Pennsylvania, and would receive

less revenue than such carriers would receive if they enjoyed an all-rail haul from the St. Louis gateway to the destination territory involved under the all-rail rates now in effect.

"14. Carriers by railroad serving Memphis, Tennessee, with lines of railroad located west of Pittsburgh, as to cotton moving barge-rail, would be deprived of participation in the transportation of cotton, in carloads, moving from points in Arkansas and from Memphis, Tennessee, to the destination territory before set out. Lines of railroad operated by carriers extending eastward from Pittsburgh, Pennsylvania, to the destination territory involved, would be required to participate in rail-barge-rail rates from points in Arkansas, and barge-rail rates from Memphis, Tennessee, lower than now in effect via all-rail routes in which such carriers participate.

"15. If the said second supplemental order of the Commission becomes effective, plaintiffs will be unable to recoup in any manner any losses which they will sustain thereby and the damage done them will therefore be irreparable." (Rec., 117-120.)

In its order of January 18, 1933, denying appellees' petition for vacation of the order of December 10, 1932, and for a hearing, the Commission postponed the effective date of said order of December 10, 1932, until February 21, 1933, upon ten days' notice. (Rec., 50.) Appellees were therefore required to publish the rates required ten days prior to February 21, 1933, or incur the penalties prescribed by law. Their bill in the court below was filed February 2, 1933. Subsequent extensions of the Commission's order of December 10, 1932, were at the suggestion of the court below.

SUMMARY OF THE ARGUMENT.

I.

SECTION 3 (e) AS CONSTRUED AND ADMINISTERED BY THE INTERSTATE COMMERCE COMMISSION VESTS IN THAT BODY THE POWER TO REQUIRE THESE APPELLEES TO PARTICIPATE IN RAIL AND WATER ROUTES WITHOUT OPPORTUNITY TO BE HEARD BEFORE THE ENTRY AND ENFORCEMENT OF SUCH AN ORDER, AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES THESE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Murray v. *Hoboken Land and Improvement Co.*, 18 Howard 272..

Dartmouth College Case, 4 Wheaton 517.

Twining v. *New Jersey*, 211 U. S. 78.

Powell v. *Alabama*, 287 U. S. 45.

Louisville & Nashville R. R. Co. v. *Kentucky*, 183 U. S. 503.

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457.

Oregon Railroad & Navigation Co. v. *Fairchild*, 224 U. S. 510.

New York & Queens Gas Co. v. *McCall*, 245 U. S. 345.

Louisville & Nashville R. R. Co. v. *Finn*, 235 U. S. 601.

Tri-State Telephone & Telegraph Co. v. *Benson*, Public Utilities Reports, 1933A, 38.

Central of Georgia Ry. v. *Georgia Railroad Commission*, 215 Fed. 421.

National Automobile Service Corporation v. *Barfod*, 137 Atl. 601.

H. Moffat Co. v. *Hecke*, 228 Pac. 546.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Board of Railroad Commissioners*, 247 Pac. 162.

Chamber of Commerce v. *Federal Trade Commission*, 13 F. (2d) 673.

II.

THE ORDER OF THE COMMISSION INVOLVED IN THIS PROCEEDING IS VOID BECAUSE MADE WITHOUT EVIDENCE TO SUPPORT IT.

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167.

Philadelphia & Reading R. Co. v. *United States*, 240 U. S. 334.

B. & O. R. R. Co. v. *United States*, 277 U. S. 291.

Brimstone R. R. Co. v. *United States*, 276 U. S. 104.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

Virginian Ry. Co. v. *United States*, 272 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

Western Chemical Co. v. *United States*, 271 U. S. 268.

Georgia Commission v. *United States*, 283 U. S. 765.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Norfolk & Western Ry. Co. v. *United States*, 287 U. S. 134.

III.

SECTION 3 (e) AS CONSTRUED AND ENFORCED AUTHORIZES THE ENTRY OF AN ORDER WITHOUT A HEARING, DENIES TO THE PARTIES THE RIGHT TO A JUDICIAL REVIEW OF SUCH ORDER, AND IS ARBITRARY AND UNREASONABLE.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413.

Stuart v. *Palmer*, 74 N. Y. 183.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S. 452.

Southern Pacific Co. v. *Inter. Com. Comm.*, 219 U. S. 433.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144.

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Procedure under Barge Line Act, 148 I. C. C. 129.

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Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74.

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Florida v. *United States*, 282 U. S. 194.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418.

Minneapolis Eastern Ry. Co. v. *Minnesota*, 134 U. S. 467.

Trustees of Saratoga Springs v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123; 83 N. E. 693.

Norwegian Nitrogen Products Company v. *United States*, 288 U. S. 294.

Southern Railway Company v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. .....

IV.

SECTION 3 (e) AS CONSTRUED AND ENFORCED AUTHORIZES THE COMMISSION TO ESTABLISH JOINT RAIL AND WATER RATES AND ROUTES WITHOUT HEARING OR EVIDENCE, AND CONSTITUTES A DELEGATION OF LEGISLATIVE POWER CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

Prentis v. *Atlantic Coast Line Company*, 211 U. S. 210.

Interstate Commerce Commission v. *Cincinnati R. Co.*, 167 U. S. 479.

Texas and Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197.

United States v. *Atchison, T. & S. F. Ry.*, 234 U. S. 476.

Wichita R. R. Co. v. *Public Utilities Comm.*, 260 U. S. 48.

Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230.

Hampton & Co. v. *United States*, 276 U. S. 394.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Fong Yue Ting v. *United States*, 149 U. S. 698.

United States v. *Zucker*, 161 U. S. 475.

Wong Wing v. *United States*, 163 U. S. 228.
Turner v. *Williams*, 194 U. S. 279.
Chin Yow v. *United States*, 208 U. S. 8.
Tang Tun v. *Edsell*, 223 U. S. 673.
Low Wah Suey v. *Backus*, 225 U. S. 460.
Zakonaite v. *Wolf*, 226 U. S. 272.
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117.
Southern Railway Company v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. .....

V.

APPELLEES PURSUED THEIR ADMINISTRATIVE REMEDIES TO THEIR ULTIMATE CONCLUSION AND ONLY APPEALED TO A COURT OF EQUITY FOR AN INJUNCTION AFTER THEIR EVERY PETITION FOR A HEARING HAD BEEN DENIED AND THEY WERE FACED WITH THE ALTERNATIVE OF COMPLIANCE WITH THE COMMISSION'S ORDER OR OF ASSUMPTION OF THE RISK OF HEAVY PENALTIES FOR ITS DISOBEDIENCE.

Procedure under Barge Line Act, 148 I. C. C. 129.
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Sugar from Points in Louisiana to Arkansas via Rail-Barge-Rail Routes, 167 I. C. C. 710.
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VI.

SUSPENSION OF THE EFFECTIVE DATE OF AN ORDER PURSUANT TO SECTION 15 (7), BEING WHOLLY OPTIONAL WITH THE COMMISSION, DOES NOT ACCORD APPELLEES DUE PROCESS OF LAW.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413.

Stuart v. *Palmer*, 74 N. Y. 183.

Louisville & Nashville R. R. Co. v. *Stock Yards Co.*, 212 U. S. 132.

Through Routes and Joint Rates, 163 I. C. C. 716.

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Cotton and Cotton Linters from the South and Southwest, 183 I. C. C. 33.

Through Routes and Joint Rates, 153 I. C. C. 129.

VII.

APPELLEES IN THIS PROCEEDING PURSUED THE ONLY REMEDY AVAILABLE TO THEM AND THE ONE EXPRESSLY PROVIDED BY STATUTE.

Wadley Southern Ry. v. *Georgia*, 235 U. S. 651.

VIII.

THE ORDER OF THE COMMISSION HERE INVOLVED CONSTITUTING AN EXERCISE OF ITS RATE MAKING POWER WOULD, IF ENFORCED, DIRECTLY AND ADVERSELY AFFECT APPELLEES AND THEY MAY PROPERLY CHALLENGE SUCH ORDER IN THE MANNER PROVIDED BY STATUTE.

Louisville and Nashville Railroad Company v. *Kentucky*, 183 U. S. 503.

Moffat Tunnel League et al. v. *United States et al.* 289 U. S. 113.

Pittsburgh & West Virginia Railway Company v. *United States et al.*, 281 U. S. 479.

Alexander Sprunt & Sons, Inc., et al. v. *United States*, 281 U. S. 249.

Edward Hines Yellow Pine Trustees, et al. v. *United States, et al.*, 263 U. S. 143.

United States et al. v. *Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299.

The Delaware and Hudson Company, et al. v. *United States, et al.*, 266 U. S. 438.

Pendergast v. *New York Telephone Company*, 262 U. S. 43.

Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U. S. 39.

Indiana General Service Co. v. *McCardle*, 1 Fed. Sup. 113.

IX.

BY REASON OF THE REFERENCE TO SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT FOUND IN SECTION 3 (e) OF THE INLAND WATERWAYS ACT, SAID SECTION 3 (e) MIGHT BE CONSTRUED SO AS TO SAVE ITS CONSTITUTIONALITY.

St. Louis Southwestern Ry. Co. v. *Arkansas*, 235 U. S. 350.

Ann Arbor R. R. Co. v. *United States*, 281 U. S. 658.

Interstate Commerce Commission v. *Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14.

ARGUMENT.

I.

SECTION 3(e) AS CONSTRUED AND ADMINISTERED BY THE INTERSTATE COMMERCE COMMISSION VESTS IN THAT BODY THE POWER TO REQUIRE THESE APPELLEES TO PARTICIPATE IN RAIL AND WATER ROUTES WITHOUT OPPORTUNITY TO BE HEARD BEFORE THE ENTRY AND ENFORCEMENT OF SUCH AN ORDER, AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES THESE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The term "due process of law" which is stated by this court to be equivalent in meaning to the words "law of the land" contained in the *Magna Charta* (*Murray* v. *Hoboken Land and Improvement Co.*, 18 Howard 272), is difficult of definition. Probably no more satisfactory summation of its meaning as gleaned from the law declared in the courts of England and the United States would be than that it protects the citizen from the arbitrary exercise of governmental power. This thought seems uppermost in all of the definitions of due process stated by courts and jurists. This was recognized in the famous definition of "law of the land" as pronounced by Daniel Webster in his argument in the *Dartmouth College case*, where he stated (4 Wheaton 517) at page 581:

> "By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules

which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

There have been many changes in the law and the form of its administration since the granting of the *Magna Charta* by King John, and the exercise of broad powers by administrative tribunals such as the Interstate Commerce Commission was unknown to that period; but throughout the changing eras the courts have recognized that the fundamental right of the citizen against the arbitrary exercise of governmental power must be preserved as was declared in that famous instrument.

This thought finds clear expression in the opinion of the United States Supreme Court in *Twining* v. *New Jersey*, 211 U. S. 78, where at page 101 it is stated by Mr. Justice Moody:

"*Second.* It does not follow, however, that a procedure settled in English law at the time of the

emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' *Holden* v. *Hardy,* 169 U. S. 366, 388; *Brown* v. *New Jersey,* 175 U. S. 172, 175.

"*Third.* But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words due process of law 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' *Bank of Columbia* v. *Okely,* 4 Wh. 235, 244 (approved in *Hurtado* v. *California,* 110 U. S. 516, 527; *Leeper* v. *Texas,* 139 U. S. 462, 468; *Scott* v. *McNeal,* 154 U. S. 34, 45)."

This court again but recently reaffirmed its concept of due process of law in the case of *Powell* v. *Alabama,* 287 U. S. 45, where it stated at page 68:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing

> are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy*, 169 U. S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin* v. *Page*, 18 Wall, 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

Thus foremost among those fundamental rights protected by the law of the land is the right of the citizen to a hearing and his day in court before being deprived of his property. That right has been consistently recognized by the Supreme Court in cases involving orders of the Interstate Commerce Commission and State regulatory bodies of exactly the same nature as are before the court in this proceeding.

The orders of the Commission establishing rates are of the character that must be surrounded by due process of law. In *Louisville & Nashville R. R. Co.* v. *Kentucky,* 183 U. S. 503, the court at page 510 states:

> "* * * that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; * * *"

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, there was involved the legality of an order of the Interstate Commerce Commission establishing certain railroad freight rates, in which proceeding the Government urged that the order could not be set aside even if the finding of the Commission was wholly without substantial evidence to support it. The court said at page 91:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recog-

nized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' "

Further on page 92 the court said:

"Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm.* v. *Northern Pacific Ry.*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc.* Ry., 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551."

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, the court enumerates (page 547) the grounds upon which orders of the Interstate Commerce Commission may be set aside:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the

power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts

will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

To the same effect is the statement of the Supreme Court in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, where at page 481, the court declares:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

In this proceeding the order of the Commission is clearly within the condemnation of the decisions of the Supreme Court referred to, for the order of the Commission is without evidence to support it, because the Commission in its construction of Section 3(e) conceived that it was required to make the order here assailed without any hearing whatsoever.

While Section 15 of the Interstate Commerce Act, dealt with in the opinions of the Supreme Court just cited, requires a full hearing prior to any order of the Commission, it is nevertheless obvious that the decisions of the court were not based upon grounds merely of statutory construction but were declaratory of broad constitutional provisions. Thus, the statement of the court in *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co., supra,* page 91, to the effect that

a finding without evidence "comes under the Constitution's condemnation of all arbitrary exercise of power." In other words, was contrary to the law of the land.

Similarly the statement in *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* that an order of the Commission may be set aside, among other grounds, "if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power," is broader than the statutory requirement for a full hearing; and for the exercise of a right of a party to set aside an order of the Commission on such grounds would necessarily require a hearing whether such right be specified in the statute or not.

That the right to a hearing prior to an order in matters of this kind is constitutional in character and not merely statutory is conclusively established by the opinion of the Supreme Court in *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510. In that case the Supreme Court of the United States by writ of error directed to the Supreme Court of the State of Washington, reviewed an order of the Railroad Commission of that State requiring the installation of certain track connections pursuant to a statute of the State of Washington. The statute in question authorized the action taken by the Commission on complaint or on inquiry on its own motion after a full hearing. (Session Laws, 1905, chapter 81, page 145, as amended March 16, 1907, Session Laws, 1907, chapter 226, page 536.)

At page 524 of its opinion the court states:

> "* * * the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established."

In its decision the court found that the hearing granted under the Washington law was an adequate one, but reversed the order of the Washington Commission on the ground it was without proper evidence to support it.

The importance of this case lies, however, in the fact that the Supreme Court of the United States undertook to determine the adequacy of a hearing and whether the order made after such hearing supported the evidence, and that it could exercise this right only under the theory that the failure of the state law to accord an adequate hearing or to require decision of the case in accordance with the evidence violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, which, of course, guarantees the same right to citizens against arbitrary action of the state as is guaranteed them against arbitrary action of the Federal Government by the Fifth Amendment to the Constitution of the United States. Compliance or noncompliance with the Washington statute was immaterial. The right of plaintiff in error to a hearing which was reviewed by the United States Supreme Court was the right to such hearing accorded him by the Fourteenth Amendment to the Constitution and not by the law of the State of Washington.

That the right to a hearing and that a decision in any

case must be in accordance with the evidence at such hearing is not merely statutory but constitutional in nature, is further disclosed by the decision of the Supreme Court in *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, where that court reviewed an order of the Public Service Commission of the State of New York. In the course of its opinion in that case the court, referring to its opinion in *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* and other cases of like character, said (page 348):

> "It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution."

Further and convincing recognition that cases declaring the necessity of a hearing and decision in accordance with the evidence adopted at such hearing were bottomed upon constitutional grounds is found in the opinion of the Supreme Court in *Louisville & Nashville R. R. Co.* v. *Finn*, 235 U. S. 601. At page 606 of that opinion the court says:

> "To deal first with the rate order. In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92. It is contended that the 'due process' provision of the Fourteenth Amendment imposes a like rule of procedure upon the States with respect to their exercise of the legislative power of rate-making."

The principle that in the exercise of the rate-making power by administrative bodies a hearing must be accorded the parties in order to afford due process of law, finds support also in many decisons of the lower federal courts and state courts of last resort, and in the writings of juristic students upon this subject.

In *Tri-State Telephone & Telegraph Co.* v. *Benson*, Public Utilities Reports, 1933A, 38, decided September 14, 1932, the United States District Court for the District of Minnesota enjoined an order of the Minnesota Railroad and Warehouse Commission, temporary in character, and to be effective only pending final determination of an investigation being conducted by the Commission, which temporary order was made without affording the Telephone Company the right to a hearing.

The Minnesota statute provided for hearing before order of the Commission but was silent as to the necessity for hearing before a temporary order of the character

set forth. The District Court held in effect that whether or not the state statute required hearing before a temporary order, the making of such order without a hearing would not constitute due process. The language of the District Court upon this point is as follows (*Public Utilities Reports* 1933A, 38, 41):

> "While the Supreme Court has not construed the statute on this point, yet, in the absence of such construction by the Supreme Court of the statute in question, we hold that the statute applies to the fixing of temporary rates as well as to final rates, and we hold that a hearing was not afforded to the telephone company before the fixing of the rates through the order of August 31, 1932 (P. U. R. 1933A, 26), and that the statute was not complied with. We are compelled to hold that there was not due process of law relating to the hearing in question."

In *Central of Georgia Ry.* v. *Georgia Railroad Commission*, 215 Fed. 421, it was held that where no statute or rule required the State Railroad Commission to give notice of and afford hearing in a proceeding to change an intrastate freight rate classification so as to reduce intrastate rates, the fact that the Georgia Commission did give notice to complainant railroad company by a letter addressed to one of its officers, as a matter of grace, did not constitute due process of law.

In *National Automobile Service Corporation* v. *Barfod*, 137 Atl. 601, which case involved the right of the insurance commissioner of Pennsylvania to take charge of the affairs of automobile service companies in certain contingencies without hearing, the Supreme Court of Pennsylvania said (page 602):

> "We have as a fixed principle in our law that no man shall be adjudged in person or property with-

out notice and an opportunity to appear and be heard. *Shambe* v. *D. & H. R. R.*, 268 Pa. 240, 135 A. 755. To condemn without a hearing is repugnant to the due process clause. 12 C. J. 1234, Sec. 1009; *Riverside, etc., Cotton Mills* v. *Menefee*, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910. In applying this general rule it must be remembered that there are certain classes of decisions that are not appropriate for a judicial body to make, though they vitally affect private rights: this is because of the nonjudicial character of the investigation or proceeding. Therefore, due process is not necessarily judicial process. *Reetz* v. *Michigan*, 188 U. S. 505, 507, 23 S. Ct. 390, 47 L. Ed. 563; *U. S.* v. *Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040; *Klafter* v. *State Board of Examiners of Architects*, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, 1221. The requirement of due process of law, however, applies to administrative as well as to judicial proceedings. The doctrine of notice and hearing thus becomes a more potent force in our land, because it applies to the decisions and acts of administrative officials, and, unless there are extraordinary emergencies, this essential requisite of due process cannot be dispensed with."

In *H. Moffatt Co.* v. *Hecke*, 228 Pac. 546, in which case there was involved a California statute dealing with inspection and determination of ownership of cattle about to be slaughtered, and did not provide for notice, actual or constructive, to the owner, the District Court of Appeal for the First District of California stated (page 548):

"One who is in the possession of property under a claim of right cannot be deprived of its posses-

sion without due process of law. To constitute due process the statute itself must provide for notice of a time and place of hearing, giving to the parties an opportunity to present in a deliberate, regular and orderly manner issues of fact and law. It is essential to the validity of the statute that it furnish the means whereby one may enforce his constitutional rights."

The concluding sentence of the above quotation is particularly pertinent in that Section 3(e) of the Inland Waterways Corporation Act, if it does not provide for a full and fair hearing, denies to these appellees the right to test out or enforce their constitutional rights.

To the same effect is the decision of the Supreme Court of Montana in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Board of Railroad Commissioners*, 247 Pac. 162, which involved the legality of an order of the Commissioners, made without hearing, requiring the construction of an industrial spur. In that case the court at page 164 says:

"If, however, the Legislature, in enacting chapter 135 of the Laws of 1917, now 3833, intended to substitute that section for 3829, it would appear that it intended to do away with the provision for notice and hearing, and to substitute in lieu thereof the discretion of the board—in effect permitting that body to determine whether it would give notice of the proceeding and whether it would accord to the carrier a hearing.

"When we conceive that the board's order to the carrier to construct the spur track is in effect a taking of property, for it requires the carrier to use its property and spend its money (*State of Washington ex rel. R. & N. Co.* v. *Fairchild*, 224 U. S. 510,

32 S. Ct. 535, 56 L. Ed. 863), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made we hold that notice and opportunity to be heard is indispensable. *Missouri Pac. Ry.* v. *Nebraska,* 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; *Union Lime Co.* v. *Railroad,* 144 Wis. 523, 129 N. W. 605; *Wichita R. & L. Co.* v. *Public Utility Com.,* 260 U. S. 48."

The case of *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673, involved a cease and desist order of the Federal Trade Commission, but the remarks of the Circuit Court of Appeals for the Eighth Circuit, in connection with the necessity for a hearing prior to such an order by that body, apply with equal force to the necessity for a hearing before the Interstate Commerce Commission in matters of the character now before this court. At pages 683-684 the court in that case said:

"When 'cease and desist' orders come before a Court of Appeals, the proceedings in such court are of an equitable nature. However, the proceedings before the Commission are not judicial and are, therefore, not amenable to a rule designed to control only equitable proceedings before a body exercising judicial power. But the fact that Equity Rule 38 is not controlling does not determine the point raised here. While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary (*Davidson* v. *New Orleans,* 96 U. S. 104, 107, 24 L. Ed. 616; *Hagar* v.

Reclamation Dist., 111 U. S. 701, 708, 709, 4 S. Ct. 663, 28 L. Ed. 569; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 118, 17 S. Ct. 56, 41 L. Ed. 369), yet there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort (*Bellingham Bay & British Columbia R. Co.* v. *New Whatcom*, 172 U. S. 314, 319, 19 S. Ct. 205, 43 L. Ed. 460); (2) reasonable notice to interested parties (*Londoner* v. *Denver*, 210 U. S. 373, 385, 28 S. Ct. 708, 52 L. Ed. 1103; *English* v. *Arizona*, 214 U. S. 359, 29 S. Ct. 658, 53 L. Ed. 1030; *Bellingham Bay & British Columbia R. Co.* v. *New Whatcom*, 172 U. S. 314, 19 S. Ct. 205, 43 L. Ed. 460; *Bauman* v. *Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; *Paulsen* v. *Portland*, 149 U. S. 30, 13 S. Ct. 750, 37 L. Ed. 637; *Lent* v. *Tillson*, 140 U. S. 316, 11 S. Ct. 825, 35 L. Ed. 419); and (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding (*Londoner* v. *Denver*, 210 U. S. 373, 385, 386, 28 S. Ct. 708, 52 L. Ed. 1103)."

Notice and the right to a hearing in proceedings before administrative tribunals are, in the opinions of juristic writers, essential to compliance with the due process clause of the Federal and State constitutions. In an editorial note in 28 Harvard Law Review, at page 198, entitled "The Right to a Hearing before Administrative Tribunals," it is stated:

"* * * Doubtless freedom from procedural shackles is one of the chief ends sought in tribunals created in response to a demand arising out of the inefficiency of our traditional judicial procedure. But some limitation must be imposed upon the exercise of executive discretion in the conduct of quasi-judicial inquiries. In this country this limitation has been furnished by the express requirements of 'due process of law' in Federal and State constitutions, English tribunals not proceeding according to express authority of the supreme Parliament have also been held within similar limits.

"In general where deprivation of liberty or property is involved the essentials of due process of law on both sides of the Atlantic are notice and hearing. One familiar exception to this is found in those cases where the immediate exigencies of police protection sanction summary deprivation of property without any hearing whatsoever. Summary imposition of penalties for violation of immigration laws has also been justified as a condition imposed upon a privilege which may be denied altogether. But it is well settled that the mere fact that administrative officials are invested with powers involving deprivation of property in their exercise, does not justify such deprivation upon mere official fiat, without hearing. * * *"

In an article entitled "Administrative Tribunals" by Warren H. Pillsbury, 36 Harvard Law Review, 583, he states on page 587:

"The due process of law clause of the Fourteenth Amendment to the United States Constitution constitutes a standing guarantee of substantial justice, and prevents such caprice or arbitrary action as would prevent a litigant from having a substantially

fair trial. The requirement of due process means opportunity for a hearing, *i. e.*, opportunity to be present during the taking of testimony or evidence, to know the nature and contents of all evidence adduced in the matter, and to present any relevant contentions and evidence the party may have. In other words, that the party have his 'day in court.' Outside of this, the due process clause does not require any particular formality or any further proceedings characteristic of a formal trial in court. While a statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption from the due process clause, which is a permanent safeguard against the recurrence of abuses such as characterized the Court of 'Star Chamber.' ''

In ''Liberty in the Modern State,'' by Harold J. Laski, Professor of Political Science in the University of London (1930), the following appears in the chapter on ''The Nature of Liberty,'' (pages 38-41):

''But the judge's authority as a safeguard to our freedom is in the modern state threatened in another way. Modern legislation is so huge both in volume and extent that the average assembly has neither time nor energy to scrutinize its details. The modern habit is, therefore, to pass Acts which confer a general power, and to leave the filling in of details to the discretion of the department concerned. To this, I think, no one can really take exception. The state must do its work; and it must develop the agencies necessary to that end. But I think we have grave reason to fear when the growth of this delegated legislative authority is accompanied with, or followed by, the conference of powers upon government departments themselves to deter-

mine the question of whether the powers they take are legal or not. I regard the growth of delegated legislation as both necessary and desirable; but if it is not gravely to impair our freedom, it should, I think, be developed only under the amplest safeguards.

"Decisions, for instance, like that on the *Fu Toy Case* (189 U. S. 253), in the United States, and in *Arlidge v. Local Government Board* (1915—A. C. 120), in England, are clearly a real menace to the liberty of the subject. They suggest a type of executive justice for which the methods of the Star Chamber are the nearest analogy. No body of civil servants, however liberal-minded they may be, ought to be free both to make the law and to devise the procedure by which its legality may be tested; and that, be it remembered, without a power of appeal from their decision. It may be taken for granted that the modern state needs an administrative law; in matters, for instance, like rate-fixing in public utilities, in workmen's compensation cases, in matters concerning public health, the views of a body of experts in a public department are generally at least as valid as that of the judicial body. But one wants to be certain in arriving at his decision the expert has been compelled to take account of all the relevant evidence; that the parties to his decision have had their day in court."

In "A Grammar of Politics," also by Harold J. Laski, the following appears in Chapter 8 on "Political Institutions" (pages 393-394):

"* * * I have already suggested that the findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public Service

Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the courts in a similar case. And I do not think it is necessary to disturb such findings. What is essential is that we should have assurance that the methods utilized in reaching such decisions are judicially satisfactory; that, for instance, there is full time for the preparation of a case, proper rules of evidence, and so forth. Every such decision, therefore, ought to be open for scrutiny by the courts, not on the ground of its substance, but on the view that it is wanting in this regard. This, it may be noted, is the attitude taken by the Supreme Court of the United States. 'This court,' said Clarke, J.,—(*New York, etc.* v. *McCall,* 38 Sup. Ct. Rep. 122, 124), 'will * * * enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right has been denied, * * * whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the constitution.' It is exactly such an assurance that the substance of due process has been observed that we require. It does not, I think, mean stereotyping any special procedure as the only proper method; administrative law, by its nature, demands elasticity. But it does mean that a judge, on examining the record of the case, can satisfy himself that the parties to it have had a full and fair hearing."

II.

THE ORDER OF THE COMMISSION INVOLVED IN THIS PROCEEDING IS VOID BECAUSE MADE WITHOUT EVIDENCE TO SUPPORT IT.

In denying to appellees herein their right to a full and fair hearing prior to the entry of the said second supplemental order of the Commission, the Commission necessarily made such order without legal evidence to support it, and the order is therefore void.

The necessity for legal evidence to support an order is clearly set forth in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88. At page 93 of the court's opinion it is stated:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm.* v. *Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that

the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S. W. R. R.*, 226 U. S. 14."

The question of whether or not an order of the Commission is supported by adequate evidence or by any evidence whatsoever, has been examined by the Supreme Court in a long line of cases. For the information of the court we list below a number of principal cases in which orders of the Commission were set aside because unsupported by the evidence.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167.

Philadelphia & Reading R. Co. v. *United States*, 240 U. S. 334.

B. & O. R. R. Co. v. *United States*, 277 U. S. 291.

Brimstone R. R. Co. v. *United States*, 276 U. S. 104.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

In addition there is listed below cases in which this question was gone into by the court but the order found to be supported by sufficient evidence.

Virginian Ry. Co. v. *United States*, 272 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

Western Chemical Co. v. *United States*, 271 U. S. 268.

Georgia Commission v. *United States*, 283 U. S. 765.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Norfolk & Western Ry. Co. v. *United States*, 287 U. S. 134.

The order of the Commission here, being without adequate and legal evidence to support it, should be set aside, for clearly there is no distinction in principle or in fact between that class of cases in which the Commission's order has been set aside for lack of sufficient evidence, and such a case as is here presented, where not even a hearing was accorded and consequently there could be no evidence whatsoever.

III.

SECTION 3(e) AS CONSTRUED AND ENFORCED AUTHORIZES THE ENTRY OF AN ORDER WITHOUT A HEARING, DENIES TO THE PARTIES THE RIGHT TO A JUDICIAL REVIEW OF SUCH ORDER, AND IS ARBITRARY AND UNREASONABLE.

Section 3(e) has been construed by the Commission as authorizing and directing that body to make the order assailed without hearing and with evidence. This is to deny to the parties that right to review the legality of the Commission's action on appeal to the Courts which is specifically granted them by other sections of the law. The right to review orders and findings of the Commission is found in Section 41, paragraph 28, and Sections 43, 44, 45, 46 and 47 of Title 28, United States Code Annotated. It is obvious that the exercise of this right to review is impossible in the case of orders made without hearing or without evidence. In the absence of a hearing a reviewing Court would be unable to determine whether an order of the Commission is arbitrary and unjust, or whether the authority of the Commission has been exercised in such an unreasonable manner as to bring it within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. Obviously there can be no inquiry by the Court as to whether the order is made without

evidence to support it, or contrary to the evidence, for there is no evidence. In law the action of the Commission must of necessity be arbitrary and unreasonable where it is directed to act without the benefit of testimony. It is not, of course, suggested that such arbitrary and unreasonable action would be intentional on the part of the Commission, but rather that such result would be unavoidable in view of the construction the Commission has placed upon the Act assailed. The validity of the law would not be saved if perchance in a particular case the action of the Commission were in fact reasonable, for what may be done under the law and not what was actually done is the test of its validity. This principle was stated by the Court in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, where at pages 424-425 it quotes with approval from an early declaration of this doctrine in *Stuart* v. *Palmer*, 74 N. Y. 183, wherein at page 188 the Court stated:

> "It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done."

The Supreme Court in a long line of cases has announced the principles that surround the judicial review of decisions of the Interstate Commerce Commission and has set forth the grounds upon which orders of the Commission may be set aside.

> *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S., 541, 547.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S. 452, 470.

Southern Pacific Co. v. *Inter. Com. Comm.*, 219 U. S. 433.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538, 544.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

We have heretofore referred to the *Union Pacific* case, *supra*, in which the Court said that an order of the Commission is final unless, among other reasons, the Commission has acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it, or if the authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power.

The Supreme Court in applying the principle thus annunciated has set aside orders of the Commission made without evidence to support them. The Court in order to enable it to reach the conclusion that such orders were without evidence to support them was compelled to examine the record of a hearing before the Commission to reach its own conclusion whether or not there was substantial evidence to sustain the order of the Commission.

In one case, *Interstate Commerce Commission* v. *N. P. Ry. Co.*, 216 U. S. 538, for example, the Court had before it an order of the Commission requiring the establishment of through routes and joint rates covering the transportation of passengers and baggage. At that time the Commission had authority to establish through routes and joint rates, provided no reasonable or satisfactory route existed. The Court, speaking through

Mr. Justice Holmes, said it was urged that this condition was addressed only to the opinion of the Commission and could not be re-examined by the Courts as a jurisdictional fact. But the Court went on to say that it was of the opinion that the Commission had no power to make the order if a reasonable and satisfactory through route existed, and that the existence of such a route might be inquired into by the Courts.

To hold that the Commission can act without a hearing, that it can act without giving the parties an opportunity to be confronted with or know the facts upon which the Commission bases its action in order to disprove or rebut those facts, and to challenge their accuracy, is to deprive the parties of the right to have a judicial review of the order on a question that the Supreme Court has said many times may be considered and determined by the Supreme Court: whether there was evidence to sustain the order of the Commission.

Further indicating the necessity for a hearing before the Commission to enable the Courts to pass upon the questions that arise in a judicial review of the Commission's orders, attention is called to the case of *Southern Pacific Co.* v. *Inter. Com. Comm.*, 219 U. S. 433, in which the Court held that an order of the Commission may in consequence of the assumption of powers not possessed by it was void. And the Court to determine whether the Commission had in fact fixed rates upon considerations that could not validly be applied in passing upon the reasonableness of rates and whether the Commission assumed to exercise powers not possessed by it, had recourse to the record of the hearing before the Commission.

In a recent case, *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, the Court said that the claim of

denial of due process was predicated by the railway company upon the assertion that the Commission's order was unsupported by the evidence; that the railway company invoked the principle that due process required not only a hearing but a fair consideration of the evidence. Upon an examination of the record before the Commission the Court said that an adequate hearing had been afforded and due weight given the evidence.

Certainly the principles of constitutional law as announced by the Supreme Court in all these cases contemplates that there shall be a hearing before the Commission; that both parties shall have an opportunity of presenting evidence, of cross-examining the witnesses of the adverse party, and of challenging by appropriate evidence the evidence of the adverse party; that it is only after such hearing has been held that the Commission may make a valid order, and that even then the order is open to review by the Courts on the question whether there was a fair hearing and whether there was substantial evidence to support the order in question. A holding at this time that no hearing is necessary therefore denies to the parties the right of a review of the Commission's decisions on questions that the Supreme Court has repeatedly said the Courts may consider in passing upon the validity of the Commission's orders.

However, the Commission speaking as a body, and individual Commissioners separately, have indicated the difficulties which surround their making of an order without hearing and evidence.

Mr. Commissioner Eastman, testifying before the House Committee on Interstate and Foreign Commerce of the House of Representatives when the bill which was subsequently enacted into Section 3(e) was before that body, stated with reference to the establishment of

through rail and water routes and differentials (page 395):

> "It does not seem to me that it is practicable for the Commission to determine such matters as these, if, indeed, it would be constitutional, without hearings and evidence; * * *"

Further at the same hearing at page 398 Mr. Eastman stated:

> "It seems to me that a hearing would be necessary in order to determine the through routes which ought to be established. It does not seem to me that every possible through routes which can be established between a rail line and the barge line is necessary or even desirable in the public interest."

Further confirmation of the complexity of the problems involved in the establishment of through rail and water rates and routes is found in the opinion of the Commission itself in *Procedure under Barge Line Act*, 148 I. C. C. 129, wherein the following language on page 140 of its opinion indicates that any brief summary hearing prior to its order would be ineffectual and futile.

> "It has been suggested that even if hearings in advance of our original action are not required, we might nevertheless hold such hearings as a matter of discretion. Those who have made suggestions of this sort have indicated that they have in mind brief hearings in which the introduction of evidence would be strictly limited. It is probable that they have not had occasion to become thoroughly familiar with the many pertinent and relevant questions which arise in the hearing of cases involving the establishment of through routes and joint rates over water lines and connecting railroads, the fixing of differentials between such rates and corresponding all-rail rates, and the prescription of equitable divi-

sions. Such a limitation of evidence as they have in mind we conceive to be impracticable, and prior 'full hearings' would plainly be destructive of the manifest intent of Congress."

Perhaps the strongest confirmation of the existence of the difficulties that beset the Commission when required to make an order without hearing is found in the separate concurring opinion of Mr. Commissioner Woodlock in *Through Routes and Joint Rates*, 153 I. C. C. 129, where at page 138 he terms the action of the Commission in making such order without hearing as a "leap in the dark."

Pertinent to this inquiry are those decisions of the Supreme Court in which that body indicates both to the Federal District Courts and to the Interstate Commerce Commission that a summary of the facts found and the reasons for their decisions are essential to proper review of the matters at issue when the case reaches that Court.

In *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U. S. 74, 86-87, the Supreme Court said:

"The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 58. And we have re-

cently emphasized the duty of such courts fully to state the grounds upon which they act. *Virginian Ry.* v. *United States,* 272 U. S. 658, 675. *Lawrence* v. *St. Louis-San Francisco Ry.* 274 U. S. 588, 591-592. *Arkansas Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 603. *Hammond* v. *Schappi Bus-Line,* 275 U. S. 164, 171. *Cleveland, C., C. & St. L. Ry.* v. *United States,* 275 U. S. 404, 414. *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781, 787. And the Commission is not excused by the fact that the carriers presented evidence on a group basis or by the omission of the southwestern lines in their petition for a rehearing to object to the use of averages. The proceedings before the Commission were for the determination of what divisions are and for the future will be reasonable. Here the issue is whether the Commission's amended determinations and the order based on them are valid. Appellants are not estopped from assailing the averages or groups adopted. A sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act.".

In *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, at page 171, the Court stated:

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present seri-

ous conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

In *Florida* v. *United States*, 282 U. S. 194, the Court at page 215 considered the lack of essential findings of fact in the following language:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted. (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante,* p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the

authority conferred by the statute, to make such determinations as the situation may require."

The Supreme Court has thus indicated to the lower Courts and to the Commission the necessity for a statement of the facts found by the Commission and the grounds for its conclusions in order that there might properly be exercised that essential right of review conferred upon the parties.

It is apparent that without a hearing or any evidence whatsoever, the right of review of the legality of the Commission's order is completely denied appellees and the action of the Commission is necessarily arbitrary and unreasonable in law, as it is also a matter of fact by reason of its inability to determine the difficult problems involved in the establishment of rail and water rates and routes without the benefit of hearing in evidence.

In the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, this Court held at page 456 that the action of the State Commission in establishing rates without a hearing deprived the railway company of its right to a judicial investigation, by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy.

To the same effect is *Minneapolis Eastern Ry. Co.* v. *Minnesota*, 134 U. S. 467.

The necessity for a proper record in order to preserve the right of review was also declared by the Court of Appeals of New York in *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123; 83 N. E. 693. At page 701 of the report of this case in the Northeastern Reporter the Court says:

"It is plain that no corporation could make its defense until it was clearly notified of what was

charged against it, and the proof to support such charge was given. While the Commission might not be bound by technical rules of evidence, still it was plainly intended that the whole proceeding should assume a quasi-judicial aspect. And this is necessarily so, for the Appellate Division is empowered to review the order of the Commission, a review which would require something in the shape of a record of the proceedings of the Commission."

Of special interest in connection with the necessity for a hearing before the Commission in order to preserve the right of review is the discussion upon this subject contained in the opinion of the Supreme Court announced by Mr. Justice Cardozo, February 6, 1933, in *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, wherein it is stated at page 319:

"The Commerce Act, as it stands to-day, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision."

The most recent announcement by this court of the necessity for a hearing in order to afford a real right of review was made in *Southern Railway Company* v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. ....., where there was involved the legality of a law of the State of Virginia which empowered the Highway Commissioner of that state to require the elimination by railroad companies of grade crossings without prior notice or hearing. The Railway Company contended among other things that the statute afforded it no possibility of an adequate judicial review of the Highway Commission-

er's act. With regard to this contention, the court, speaking through Mr. Justice McReynolds, said:

> "After affirming appellant's obligation to comply with the Commissioner's order, the court below said— 'The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand'. But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily 'arbitrary'. There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion."

IV.

SECTION 3(e) AS CONSTRUED AND ENFORCED AUTHORIZES THE COMMISSION TO ESTABLISH JOINT RAIL AND WATER RATES AND ROUTES WITHOUT HEARING OR EVIDENCE, AND CONSTITUTES A DELEGATION OF LEGISLATIVE POWER CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

In the brief of appellees, United States and Interstate Commerce Commission, appellees' contention that Section 3(e) constitutes an unconstitutional delegation of legislative power is construed as being merely a pertinent ancillary to their contention that the statute de-

nies to them due process of law contrary to the fifth amendment. Such is not the case. The attempt by Congress to confer upon the Commission a purely legislative function constitutes a separate and independent violation of the requirements of the Constitution of the United States.

The making of rates for the future is a legislative act (*Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210), and while the Congress might, without hearing, itself establish a rate (as investigation on its part in theory at least is presumed), the power so to act without hearing or investigation cannot be delegated to the Commission or any other body.

The Interstate Commerce Commission is not invested, and cannot under the Constitution be invested, with legislative power. *Interstate Commerce Commission* v. *Cincinnati R. Co.*, 167 U. S. 479; *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *United States* v. *Atchison, T. & S. F. Ry.*, 234 U. S. 476.

The general doctrine as to the extent to which the authority of the Legislature may be delegated to an administrative agency is concisely stated by the Supreme Court in *Wichita R. R. Co.* v. *Public Utilities Comm.*, 260 U. S. 48, where the Court examined into the powers of the Kansas Commission over rates for electric light and power charged in that State. At page 59 the Court states:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and

show a substantial compliance therewith to give validity to its action."

The only rule of decision laid down in Section 3(e) is that the through rates and routes and minimum differentials required to be established thereby must be reasonable and lawful. Such reasonableness and lawfulness can be determined only by a full and fair hearing, and the establishment of rates and routes and differentials without such hearing constitutes necessarily an exercise by the Commission of pure legislative power.

In the case of *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 245, the question arose as to whether the Ohio statute relating to censorship of motion pictures constituted an invalid delegation of legislative power. In discussing this question the Court said:

> "Undoubtedly the legislation must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

The clear distinction between the powers which may be exercised by Congress and by its agent, the Interstate Commerce Commission, is set forth by the Supreme Court in *Hampton & Co.* v. *United States*, 276 U. S. 394, where at page 407 the Court said:

> "Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.

> Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

The question naturally arises, how may the Commission apply the policy and legal principles laid down by the Congress to particular situations, absent investigation of the facts and without a full and fair hearing? It is clear that Section 3(e) violates the principles set forth in the above cases by investing the Interstate Commerce Commission with power to establish through rail and water rates, routes and divisions without opportunity given to the rail carriers to be heard.

That the rate-making power of the Commission is a delegated legislative power to be executed by it only after determination as to whether the facts of a given case conform to the criteria prescribed by Congress, is further established by the decision of this Court in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, decided November 7, 1932. There was there involved

a question as to the legality of the action of the Commission under Section 5, paragraph (2), and Section 20a, dealing with certificates of convenience and necessity and issuance of securities, and the contention was made that the delegation of authority to the Commission was invalid because the stated criteria, that is, the public interest, was not certain. Dealing with this contention the Court said at page 25:

> "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity."

That in cases where there is a delegation to an executive or administrative body or official of power to apply and administer a law in accordance with the general directions therein set out, due process requires a hearing before such executive or administrative action is disclosed by the somewhat analogous cases relating to the exclusion and deportation of aliens. There the determination of the facts upon which an exclusion or a deportation order may be based is placed by the statute finally in the hands of officers of the executive branch

of the Government, and although the statute itself provides for hearing, the Court has uniformly held that such hearing must be a fair one and that the party involved shall have the right to summon and produce witnesses in its behalf and by counsel cross-examine those appearing against him.

Fong Yue Ting v. *United States*, 149 U. S. 698.
United States v. *Zucker*, 161 U. S. 475.
Wong Wing v. *United States*, 163 U. S. 228.
Turner v. *Williams*, 194 U. S. 279.
Chin Yow v. *United States*, 208 U. S. 8.
Tang Tun v. *Edsell*, 223 U. S. 673.
Low Wah Suey v. *Backus*, 225 U. S. 460.
Zakonaite v. *Wolf*, 226 U. S. 272.

Pertinent also is the case of *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. In that case the Court held that although the statute creating the Board of Tax Appeals was silent as to its power to provide for the qualifications, etc., of persons practicing before it, it might nevertheless under its general power to make rules and regulations provide the qualifications necessary for attorneys and accountants to practice before it, but that before anyone should be excluded from such right such party was entitled to a full hearing before the Board in order to conform to the Fifth Amendment.

The fact that the Congress might act without a hearing in no sense implies that that body could delegate to the Commission any such power or authority. In support of this last statement we again refer to the case of *Southern Railway Company* v. *Commonwealth of Virginia, ex rel, supra*, decided December 4, 1933, in which this Court in dealing with an order of the Highway Commission of Virginia directing a railway company to sep-

arate the grades at a public crossing, without a hearing, said:

> "Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

It is of great significance that Congress, in creating other administrative agencies with powers akin to those conferred upon the Interstate Commerce Commision, has recognized the requirements of due process and the prohibition against delegation of legislative power, by requiring that the functions of such other bodies akin to those of the Commission be exercised only after a hearing. Thus, in the Grain Futures Act, U. S. C. A., Title 7, Sec. 8, the Commission there provided for is authorized to revoke the designation of any board of trade as a contract market only after notice to such board of trade and upon a hearing.

In the Packers and Stock Yards Act, U. S. C. A., Title 7, Chapter 9, the rates and charges of stock-yard owners

or market agencies may be prescribed only after a full hearing.

In the Federal Trade Commission Act, U. S. C. A., Title 15, a cease and desist order in connection with any unfair competition in commerce may only be issued after a hearing.

The Commission in its second supplemental order in *Ex Parte No.* 102 and here assailed has prescribed, without hearing, without testimony, in fact without evidence of any character, water and rail rates, has determined the level of such rates, and has demanded that such water and rail rates should be a certain percentage lower than the all-rail rates between the same points, and this without evidence and without a hearing. To construe said Section 3 as authorizing such action on the part of the Commission constitutes a clear delegation of legislative power to that body.

V.

APPELLEES PURSUED THEIR ADMINISTRATIVE REMEDIES TO THEIR ULTIMATE CONCLUSION AND ONLY APPEALED TO A COURT OF EQUITY FOR AN INJUNCTION AFTER THEIR EVERY PETITION FOR A HEARING HAD BEEN DENIED AND THEY WERE FACED WITH THE ALTERNATIVE OF COMPLIANCE WITH THE COMMISSION'S ORDER OR OF ASSUMPTION OF THE RISK OF HEAVY PENALTIES FOR ITS DISOBEDIENCE.

Appellants upon brief advance the theory that appellees failed to exhaust their administrative remedies before seeking the protection of a Federal court of equity and that they might have secured a hearing had they filed a complaint pursuant to Section 3(e) of the Inland Waterways Corporation Act and sought a suspension by the Interstate Commerce Commission of the

rates published pursuant to the Commission's order pending a hearing on such complaint.

Appellees sought relief in a court of equity only after every petition they had filed with the Commission for a full and fair hearing had been denied and they were faced with the immediate alternative either of compliance with the Commission's order or the risk of incurring heavy penalties by reason of its disobedience.

At page 21 of the brief of the United States and the Interstate Commerce Commission it is said:

> "It is well settled that rates prescribed by the Interstate Commerce Commission may not be enforced until after the parties have been heard."

Again at page 25 of their brief those parties say:

> "The summary order which the Commission in sec. 3(e) is directed to issue, was never intended by Congress to be a final finding against the carriers. It is plain from the procedure ordained that the order is provisional in character. The rights of the parties are only tentatively fixed; they become finally fixed in the event the provision for a hearing is not invoked by the filing of a complaint."

This contention of appellants that the rail carriers are entitled to a hearing before orders made under Section 3(e) become effective constitutes the first intimation from any authoritative source since the enactment of Section 3(e) that any such right to hearings existed.

The interpretation of Section 3(e) now urged by counsel for appellants is contrary to the interpretation of such section formally announced on many occasions by the Interstate Commerce Commission, and finds no support in the language of Section 3(e) itself. If the rail carriers are entitled to any hearing it is not one which may be granted wholly at the Commission's dis-

cretion under Section 15(7), but is the full and fair hearing contemplated by Section 15(3) expressly referred to in Section 3(e), a hearing which, however, the Commission and counsel for appellants say appellees are not entitled to.

Shortly after the enactment of Section 3(e), the Commission instituted its proceedings entitled *Ex Parte No. 94* for the purpose of securing the views of interested parties with respect to the meaning and purpose of that section and with respect to the procedure which it should follow thereunder, particularly with reference to the extent to which public hearings were required. After a consideration of the views presented to it, the Commission on November 12, 1928, handed down its opinion in said proceeding, 148 I. C. C. 129, in which it construed Section 3(e) as directing it, upon the application of any common carrier by water on the inland waterways of the United States to which a certificate of convenience and necessity had been granted, to summarily establish joint through rail and water rates without according to the interested rail carriers or other parties a hearing upon the issues presented, leaving to such interested parties only a right to file a formal complaint in the event they believed themselves in any way aggrieved by such summary action of the Commission made without hearing. Such interpretation by the Commission of Section 3(e) announced by it in the proceeding just referred to has been uniformly followed by the Commission in other cases as well as in the proceeding now before this court.

In that proceeding, commencing at the foot of page 133, the Commission stated:

> "It thus appears that under the interstate commerce act we have full authority to establish through

routes and maximum joint rates over connecting rail and water lines and to prescribe the divisions of such joint rates; and that we may also, for good cause shown, at any time thereafter reconsider and reverse, change, or modify such requirements. But no such requirement may be made without prior full hearing, except that if we declare an emergency to exist we may establish temporarily through routes without notice or hearing. This recital of existing powers under the interstate commerce act is, we think, important, because it is a reasonable assumption that Congress did not, in the legislation here in question [Section 3(e)], intend merely to duplicate authority already granted."

There is here no intimation that a full and fair hearing will be granted prior to the effective date of the rates ordered.

In the same opinion, in considering whether the reference to paragraph (3) of Section 15 imported into Section 3(e) the requirement of a full hearing, the Commission stated (page 136):

"There is here no provision for a hearing, unless it be contained in the words, 'as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended.' That paragraph makes provision for a full hearing, but in our opinion the procedure so prescribed is not imported into this legislation by the reference to the paragraph. If it is so imported, nothing of substance is added to existing law, so far as the establishment of through routes and joint rates is concerned."

According to the Commission's interpretation equally would nothing of substance be added to existing law were a hearing required under paragraph (7) of Section 15 instead of paragraph (3) of Section 15.

Continuing on the same page the Commission said:

> "The intention is clear that once the certificate of public convenience and necessity is granted, the order directing the establishment of through routes and joint rates shall issue either contemporaneously or immediately thereafter. This is inconsistent with a procedure that would require a full hearing prior to the issue of the order."

Would not hearings subsequent to the issuance of the order but prior to its effective date be equally inconsistent according to the Commission's interpretation of Section 3(e)?

Continuing further upon the same page the Commission states:

> "Clearly, we think, it was the intent to substitute in this way subsequent hearings for prior hearings."

Again at page 138 the Commission states:

> "In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint. Otherwise the provision would in its entirety serve no substantial purpose, for, as we have already pointed out, section 16a of the interstate commerce act makes full and ample provision for the rehearing of decided cases and the modification or entire reversal of any orders which may have been entered therein."

That the Commission interpreted Section 3(e) as requiring it to make its orders effective prior to hearing is confirmed by the following language at page 140 of

its same opinion in *Procedure under Barge Line Act, supra:*

> "It has been suggested that even if hearings in advance of our original action are not required, we might nevertheless hold such hearings as a matter of discretion. Those who have made suggestions of this sort have indicated that they have in mind brief hearings in which the introduction of evidence would be strictly limited. It is probable that they have not had occasion to become thoroughly familiar with the many pertinent and relevant questions which arise in the hearing of cases involving the establishment of through routes and joint rates over water lines and connecting railroads, the fixing of differentials between such rates and corresponding all-rail rates, and the prescription of equitable divisions. Such a limitation of evidence as they have in mind we conceive to be impracticable, and prior 'full hearings' would plainly be destructive of the manifest intent of Congress."

Surely a hearing subsequent to the filing of tariffs but prior to their effective date would be equally destructive of the manifest intent of Congress as interpreted by the Interstate Commerce Commission.

Appellants failed to refer to any language of the Interstate Commerce Commission supporting the interpretation of Section 3(e) now advanced by them, for the very sufficient reason that no such language is to be found. The solemn pronouncements of the Commission are all to the contrary. They refer, however, to the separate concurring opinion of Mr. Commissioner Brainerd in *Procedure under Barge Line Act,* 148 I. C. C. 129, which separate expression was concurred in by Mr. Commissioner Farrell, in which separate expression the view was advanced that in order to comply with the requirements

of due process of law the Commission would be required, at the request of a carrier, to suspend rail and water rates ordered in without a hearing.

It is of extreme significance that any suggestion as to the duty of the Commission to suspend the rates prior to their effective date appears only in the separate expression of two Commissioners. Not the slightest intimation of the existence of any such right is found in the majority opinion. In fact the language of such majority opinion clearly indicates to the contrary, and it is obvious that the views of Messrs. Brainerd and Farrell were not concurred in by the other nine Commissioners. On a matter of such outstanding importance as whether or not the parties to a proceeding are entitled to a hearing before an order may be enforced against them, it is only reasonable to assume that if the majority of the Commission believes any such right existed an expression in clear and unequivocal terms to that effect might be looked for in its report. Not only is such expression totally absent, but the language of the report is clearly to the contrary, as has been the uniform administration of Section 3(e) by the Commission since its interpretation in *Procedure under Barge Line Act, supra.*

In the Commission's fourth supplemental report in *Through Routes and Joint Rates,* 167 I. C. C. 385, it said at page 389:

> "We recognize that the computation of rail-barge-rail rates under the formula is a task of considerable magnitude, that considerable time will be required to complete the task if the formula is literally applied, and that in many instances undesirable results will flow from its literal application. But it must be borne in mind that the formula was promulgated under the Denison Act, which directs us to require

without hearing rates, routes, and differentials which in our judgment are reasonable. The formula represents only our best judgment, with the information as yet before us, of what constitutes a general basis for the construction of reasonable rates and differentials. We shall be glad to consider suggestions from any source for improvements in the formula."

In *Ex Parte No. 99, Application of Mississippi Valley Barge Line Company,* 178 I. C. C. 224, the Commission said (226-7):

"* * * The southwestern lines also express the view that the *Ex Parte* 96 formula does not reflect the true relation between barge and rail transportation with respect to cost, and request that no additional barge-rail or rail-barge-rail rates be prescribed except after a hearing at which adequate evidence bearing on the respective costs is produced. In *Procedure under Barge Line Act,* 148 I. C. C. 129, 138, in referring to the Denison Act, we said:

> 'In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.'

"The interpretation above stated is inconsistent with the contention of the southwestern lines that no differential rates should be required except after hearing, but, as pointed out, the way is open to them to invoke the procedure providing for a hearing after establishment of the prescribed rates. * *"

In *Through Routes and Joint Rates,* 172 I. C. C. 525, fifth supplemental report, the Commission said at page 528:

"* * As we have pointed out in previous re-

> ports, our findings in a proceeding of this nature, being required to be made without the benefit of hearing or complete information, are necessarily general and summary in character and a review through formal hearings of such findings is available upon complaint of any of the interested carriers that the resulting through routes, joint rates, or differentials are unreasonable or otherwise unlawful."

In I. & S. Docket No. 3411, *Sugar from Points in Louisiana to Arkansas via Rail-Barge-Rail Routes,* 167 I. C. C. 710, the Commission said (714-5):

> "Except in so far as the Denison Act requires the prescription of joint rates and minimum differentials without hearing, it does not set aside the interstate commerce act. Certainly there is nothing in the Denison Act which deprives competing shippers or communities of the rights extended to them by section 3 of the interstate commerce act, which prohibits undue prejudice and preference, and there is nothing which sets aside the provision of Section 4 which prohibits higher rates from intermediate than from more distant points unless approved by us. The formula upon which the suspended rates are based is general in character, prescribed in a proceeding embracing rates on classes and thousands of commodities from and to thousands of points. It was issued without hearing and without knowledge of the facts here brought to our attention. The formula simply represents our best judgment under such circumstances of a general plan designed as nearly as may be to carry out the provisions of the Denison Act. * * *"

Certainly there is nothing in the foregoing language which even faintly suggests any intention on the part of the Commission to accord the parties a hearing before the rates prescribed become effective.

In the report of the Commission which is the subject of this appeal, *Application of American Barge Line Company,* 190 I. C. C. 177, Exhibit E, Record 111, it is stated at page 179 of the Commission's opinion:

> "In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in *Procedure under Barge Line Act,* 148 I. C. C. 129, after instituting a proceeding to ascertain the views of interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that act does not authorize hearings as to the differential rates referred to therein, being 'an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.' The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated."

In the above quoted paragraph the Commission referred to the request of appellees and other carriers, dated November 12 and November 14, 1932, that they be accorded a hearing prior to the effective date of any order requiring joint rail and water rates, which documents are on file as Exhibits C (Rec. 87) and D (Rec. 103) in this proceeding. Subsequent to the issuance of the second supplemental report of the Commission of December 10, 1932 (Exhibit E, Rec. 111), the southwestern carriers by petitions dated December 30, 1932, and January 7, 1933 (Exhibits F (Rec. 111) and G (Rec. 112) herein), again requested the Commission to postpone the effective date of its order sufficiently to grant them a full and fair hearing as to the issues presented. Those petitions were denied by order of the Interstate

Commerce Commission dated January 18, 1933 (Exhibit H (Rec. 116) herein). In none of said orders of the Commission denying appellees' repeated requests for a hearing is there even the slightest intimation that such hearing might be obtained were they to file a complaint and request postponement of the effective date of the Commission's orders pending determination of the issues presented in such complaint. While in the Commission's order of January 18, 1933 (Exhibit H (Rec. 116)), denying appellees' petition for vacation of the order, reopening, rehearing, and dismissal, it is stated by the Commission that such action is "without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act," there is no suggestion in such order that the effective date of the said second supplemental order of December 10, 1932, would be vacated pending determination of the issues which might be presented in any complaint filed with the Commission by appellees. By that order appellees were required to comply with the order by February 21, 1933, or otherwise incur the severe penalties prescribed for violation of orders of the Interstate Commerce Commission. Before such date for compliance, however, appellees on February 2, 1933, filed their bill of complaint in the District Court, and further postponements of the order were at the suggestion of the court. But for the intervention of the Federal court expressed in its suggestions for temporary postponements, and after hearing in the form of a final decree these appellees would have, at the risk of the penalties prescribed, been re-

quired to comply with the Commission's order without the benefit of a hearing.

It is argued that appellees have no legal rights, in so far as this proceeding is concerned, because they have not asked the Commission to suspend the rates. We ask this question: Will any court assume that the Commission, having denied to the appellees a hearing before ordering the rates to be established, would, upon the request of such appellees after the order was entered, suspend the application of the rates for the purpose of having a hearing to determine the very questions the carriers sought to have determined before the orders assailed were entered? Is it not a remarkable statement on the part of the appellants to assert that while the Commission refused a hearing before it entered the order, it would thereafter do the very thing it had refused to do, provided the carriers filed the rates?

In order to clarify the term "prior hearing," so many times used by the appellants in this case, it might be helpful to say that Section 3(e) as construed by the Commission provides neither for a prior nor subsequent hearing in a proceeding in which the rail-water-rail and water-rail rates are fixed. The idea seems to run through most of the arguments advanced by the several appellants and interveners that provision is made for a hearing in connection with the establishment of these rates. Nothing is further from the fact. The Commission prescribes the rates without a hearing and closes the case. If the rail carriers are dissatisfied, they may institute another and entirely separate proceeding before the Commission, at which separate proceeding the Commission will hear the complaint. In so far as this case is concerned, the order of the Commission is final. The fixing of the rates, and the requirement that these appellees shall join therein, is one proceeding before the

Commission; the trial before the Commission of any complaints the carriers may file is another.

The Commission in its opinion in *Procedure under Barge Line Act, supra,* pointed out (page 133) that it already possessed power to require joint rail and water rates after hearing, and that the Congress did not intend by the passage of Section 3(e) to duplicate the authority already granted. That such was not the intention of Congress is clear from a reference to the proceedings before that body. In House Report No. 1537, House of Rep., 71st Cong., 1st sess., appears the following statement (Rec. 124):

> "This policy of opposition on the part of many of the railroads has resulted in years of delay in the extension of the benefits of water transportation to interior communities and has seriously retarded the successful operation of the Inland Waterways Corporation. Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.
>
> "The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.
>
> "Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately

resu'[4] in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people a large part of the country the economies of cheaper transportation by water.

"This paragraph of the bill authorizes the Commission to direct connecting common carriers to join with the water carriers in through routes and joint rates, and to fix reasonable minimum differentials between all rail rates and joint rail and water rates; and it further authorizes the Commission to require the rail and water carrier to enter into negotiations for the purpose of establishing equitable divisions of joint rates within 30 days after such joint rates are established. If they fail to so agree upon equitable divisions within 120 days, the Commission shall itself determine and establish reasonable divisions of such rates. Provision is made for any carrier who feels aggrieved by such action of the Commission to make complaint and have a full hearing under short proceedings, and the Commission is authorized to give the hearing and decision of such question preference over all other questions pending before it, except such questions as are given preference by law. All carriers are thus given their day in court."

Also indicative of the intention of Congress is the following excerpt from the remarks of Congressman Newton when House Bill 13512 (Section 3(e)) was before the House on May 15, 1928, (Congressional Record, page 8770, 70th Congress, 1st session):

"The existing law provides for joint rates between the barge line and the railroads. Congress

very clearly has indicated its desire to foster the development of water transportation. There has been a great deal of delay and, it seems to me, unnecessary delay at times, in putting into effect these joint rates. The testimony before the Committee evidenced a lack of willingness at times on the part of some of the railroads to co-operate with this government barge line. The sooner a joint rate structure is put into effect the quicker this demonstration will be at an end. It has, therefore, become more and more apparent to those of us who want to see this demonstration successfully made that Congress must provide a more expeditious way for instituting these joint traffic arrangements between the barge lines and the railroads. *This the bill does.*" (Italics ours.)

"Furthermore, there is another reason: with joint rates, the shippers and receivers in the interior, off the river, get the benefit of this transportation. Without joint rates they do not get the benefit. Now that Congress has again expressed its policy in reference to this development of water transportation, I hope that in the future we will have more co-operation from the railroads of the country. If we do not get it, I believe these provisions will substantially expedite proceedings completing joint traffic arrangements and a suitable division of through rates."

It is evident, therefore, that the Congress clearly intended, for the purpose of securing haste in the establishment of joint rail and water rates, to dispense with any necessity for a hearing before such rates were enforced against the carriers.

It is also evident that the Commission so interpreted

the intention of Congress. At page 140 of its report in *Procedure under Barge Line Act, supra,* it said:

> "In referring to this matter on brief counsel for the Association of Railway Executives said:
>
> > 'It will thus be seen that the patron of the bill and the House committee, as shown by the majority report, took the position that no hearing in advance was essential before through routes and joint rates should be established, and that the requirements of due process of law would be fully complied with by providing for a subsequent hearing before the Commission of a dissatisfied carrier.
> >
> > 'It seems, therefore, that the intention of the proponents of this bill was to provide for the establishment of through routes and joint rates without any hearing in advance.'
>
> "Having ascertained the plain meaning of the legislation in question from the language employed, and finding in addition that this meaning is clearly supported by the reports of the legislative committees, we have gone as far as we think we ought to go. The constitutionality of what has been done is for the courts to decide and upon that question we express no opinion."

There can thus be no question that the Commission interprets Section 3(e) as requiring the establishment and enforcement of rail and water rates without a hearing. Otherwise of what significance is their observation that the constitutionality of what was done by Section 3(e) is a matter for the courts and not for that body.

Under the interpretation of Section 3(e) now advanced by counsel for appellants the procedure to accomplish the establishment of joint rail and barge line rates, instead of being shortened, would in fact be made longer and more cumbersome. Under such interpretation the Commission would first hand down its report

and order requiring the establishment of joint rates upon such basis as it might deem proper, and such rates would have to be filed and published by the carriers at substantial outlay of time and money, and thereafter upon complaint the rates would be suspended pending a hearing as a result of which the rates already filed and published might be amended or changed requiring further clerical effort to effect such purpose. Under such interpretation no possible purpose whatsoever would be served by in the first instance filing and publishing the rates required by the Commission. The procedure involved would be a futile one. The assertion that it was intended by the Congress is refuted by the proceedings before that body, by the language of the Act, and by the interpretation heretofore placed upon the Act by the Commission.

VI.

SUSPENSION OF THE EFFECTIVE DATE OF AN ORDER PURSUANT TO SECTION 15(7), BEING WHOLLY OPTIONAL WITH THE COMMISSION, DOES NOT ACCORD APPELLEES DUE PROCESS OF LAW.

Appellees submit that even under the interpretation placed upon Section 3(e) in the briefs of appellants, they are not assured of a hearing prior to the effective date of orders of the Commission under that section because whether or not the Commission will exercise its power of suspension and grant a hearing is wholly optional with it. That is conceded in the brief of appellants United States and Interstate Commerce Commission at page 30 where it is said:

> "Although the Commission under the aforementioned sections of the statute may refuse to grant a stay at its discretion, its action in the present case was pre-determined."

Section 15(7) is in part as follows:

"* * * and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *"

It is hardly to be assumed that Congress intended to amend paragraph (7) of Section 15 to require in this class of cases that the power of suspension be not at the discretion of the Commission without even making any reference whatever in said section to Section 3(e) of the Inland Waterways Corporation Act. A hearing thus at the grace or option of the Commission does not save the constitutionality of Section 3(e). The Commission might exercise the discretion invested in it by paragraph (7) of Section 15, to refuse appellees' prayer for suspension and allow the rates to go into effect. In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, the Supreme Court of the United States quotes with approval an early declaration of the principle that what may be done under the act constitutes the test of its constitutionality, made in *Stuart* v. *Palmer*, 74 N. Y. 183, wherein at page 188 the court stated:

"It is not enough that the owners may, by

> chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

The same principle is concisely stated in *Louisville & Nashville R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132. At page 144 of the court's opinion in that case it is stated:

> "The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Thus, the fact that the Commission may, upon appellees' request, suspend the rates, does not save the constitutionality of the statute. Appellees' right to a hearing before their property is taken must be an absolute one.

The statement in the brief of appellants United States and Interstate Commerce Commission at page 11 that the Interstate Commerce Commission has made a practice of suspending orders under the Barge Line Act pending subsequent hearing is supported neither by a history of the Commission's administration of Section 3(e) nor by reference to the Commission cases cited in that brief. The issues in each of such cases were principally and primarily confined to whether the rates re-

quired by the Commission without hearing resulted in undue preference or prejudice contrary to Section 3 of the Interstate Commerce Act, or in violations of the long-and-short-haul clause of Section 4 of that Act. In *Through Routes and Joint Rates*, 163 I. C. C. 716, the rates required were suspended upon the protest of the Mobile Chamber of Commerce upon the ground that their publication would result in fourth-section departures and in violations of Section 3 prohibiting undue preferences and prejudices. Similarly in *Sugar from Louisiana to Arkansas*, 167 I. C. C. 710, and *Cotton and Cotton Linters from the South and Southwest*, 183 I. C. C. 33, the principal inquiry of the Commission was as to violations of Sections 3 and 4 in the rates prescribed. In none of the cases was there a full and complete inquiry as to the propriety of the formula as to routes and rates to be established or the maximum reasonable character of such rates. In fact in *Sugar from Louisiana to Arkansas, supra*, the Commission said at page 714 of its opinion:

> "The so-called Denison Act requires us to direct the rail and water carriers to establish through routes and joint rates with 'reasonable rules, regulations, and practices' and to—
>
> > 'fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by the order of the commission.'
>
> Except in so far as the Denison Act requires the prescription of joint rates and minimum differentials without hearing, it does not set aside the interstate commerce act. Certainly there is nothing in the Denison Act which deprives competing shippers or communities of the rights extended to them by section 3 of the interstate commerce act, which pro-

hibits undue prejudice and preference, and there is nothing which sets aside the provision of section 4 which prohibits higher rates from intermediate than from more distant points unless approved by us. The formula upon which the suspended rates are based is general in character, prescribed in a proceeding embracing rates on classes and thousands of commodities from and to thousands of points. It was issued without hearing and without knowledge of the facts here brought to our attention."

Therefore, instead of these cases indicating a settled policy on the part of the Commission to suspend the rates required by it under Section 3(e) until full hearing might be afforded, they show the actual settled policy of the Commission to be to require the establishment and maintenance of such rates without such hearing. In fact, it should further be pointed out that in each of the three cases cited only a part of the rates required to be established by the Commission in orders issued under Section 3(e) were suspended and made the subject of investigation. The remainder of the rates were required to be maintained. All of the rates involved in the suspension proceedings were published in pursuance of the Commission's orders in *Through Routes and Joint Rates*, 153 I. C. C. 129, covering all classes and commodities, while the suspension proceedings involved only a small part of the adjustment required both as to commodities and points of origin and destination. It is therefore disclosed that the settled policy of the Commission is not to suspend rates required by it under Section 3(e) except where the rates so required may result in violations of other sections of the Act, such as Sections 3 and 4.

VII.

APPELLEES IN THIS PROCEEDING PURSUED THE ONLY REMEDY AVAILABLE TO THEM AND THE ONE EXPRESSLY PROVIDED BY STATUTE.

It is suggested in brief of appellants United States and Interstate Commerce Commission that appellees were not entitled to proceed by injunctive process in a court of equity against the order of the Interstate Commerce Commission here involved, but that their remedy lay in a refusal to obey such order or in ignoring it and awaiting the suit by the United States or the Interstate Commerce Commission for its enforcement. These appellants, however, advance with considerable hesitation the theory that the drastic penalties provided by the Interstate Commerce Act for failures to obey orders of the Commission would not have applied in the instant case. They say on brief, pages 28 and 29:

> "It is not at all clear, moreover, that penalties for disobedience of the Commission's order have been provided by the Act. While it is true that Section 3 (e), under examination, contains a reference to Section 15 (3) of the Interstate Commerce Act, and that violations of said Section 15 (3) are punishable by penalties described in Section 16 (8) of the Interstate Commerce Act, the fact that the orders of the Commission under said Section 15 (3) are to be issued only after full hearing, unlike the procedure in the section under consideration, would appear to make it highly doubtful that the penalties to be incurred for violation of the former section would be applicable in the present instance."

The penalty concerning the applicability of which such doubt is expressed by counsel for the United States and

the Interstate Commerce Commission consists of a fine of $5,000 for each offense, and in the case of a continuing violation each day is to be considered a separate offense. The magnitude of the sum at stake, were the procedure suggested by counsel for the government to be followed, is at once apparent. It is true that no rail carrier can be subjected to a penalty such as a fine without judicial proceeding, but it is also true that when a carrier is confronted with an order of the Commission by virtue of which it must comply or take the chances of being compelled to pay damages for failure to comply, or seek refuge in a court of equity to enjoin the enforcement of the order and protect itself from such penalties, it may in good faith adopt the method last stated and invoke the aid of a court of equity. This court is familiar with the cases, some of which are cited by defendants, to the effect that penalties do not accrue while a citizen in good faith is reviewing an order of an administrative body in the courts. Those cases also establish the salutary principle that a citizen is not required to refuse to obey the order and take his chances on suffering heavy penalties, but may test out the validity of the order as a plaintiff in a court of equity, and that it what appellees are doing in this proceeding. Such manner of procedure was especially approved by the United States Supreme Court in *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, where at page 669 the court said:

> "But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the

penalty when that defense, as here, proved to be unsuccessful."

Here the appellees have resorted to the remedy approved in the *Wadley Southern case*, and expressly provided for in the statute.

In connection with the foregoing a somewhat unusual circumstance is presented where counsel for the Interstate Commerce Commission, while asserting the legality of a order of the Interstate Commerce Commission suggests that such order may be safely ignored or disobeyed by the parties against whom it is directed.

VIII.

THE ORDER OF THE COMMISSION HERE INVOLVED CONSTITUTING AN EXERCISE OF ITS RATE MAKING POWER WOULD, IF ENFORCED, DIRECTLY AND ADVERSELY AFFECT APPELLEES AND THEY MAY PROPERLY CHALLENGE SUCH ORDER IN THE MANNER PROVIDED BY STATUTE.

All of appellants assert that the order of the Commission involved in this proceeding affects no legal interests of appellees and hence they are without standing to maintain this suit. This contention is apparently advanced upon the theory that appellees' sole complaint is of possible loss of traffic to some competitor. Such is not the case.

Appellees complain of the unlawful exercise by the Interstate Commerce Commission of its maximum rate-making power and of the diversion of traffic from them only in so far as such diversion is affirmatively required by the Interstate Commerce Commission through its order requiring them to join with the American Barge Line Company as partners in through routes and through rates. They thus complain of an unlawful exercise by the Interstate Commerce Commission of a power directly

affecting them and compelling them to become the unwilling instruments of their own injury.

In the appellees' bill of complaint in the court below complaint was made that the order of the Commission would compel them to participate in joint rail and water rates substantially lower and yielding substantially less revenue than the all rail routes maintained by them. Complaint was and is also made of the diversion of traffic, but only in so far as such diversion is accomplished by the affirmative order of the Interstate Commerce Commission directed to these appellees. No complaint is or was made of the setting up or permitting by the Government of a competitive agency which might take traffic from these appellees. They do complain of the Commission requiring them to become partners with the Barge Line without affording appellees due process of law.

The order of the Commission involved in this proceeding constituted a direct exercise of its maximum rate-making power. While the maximum rates to be observed by these appellees pursuant to such order were expressed in the terms of differentials under existing all rail rates, nevertheless the rail and water rates so arrived at upon such differential basis constituted a basis of maximum rates which must have been observed by appellees had the order become effective. There was no question but that the exercise by the Commission of this function in an unlawful manner may be challenged by the carriers against whom it is directed in a three-judge court, and the cases to that effect are so numerous as to make citation unnecessary. In fact, this court has held that the exercise of such maximum rate-making power must be accompanied with due process of law. In *Louisville and Nashville Railroad Company* v. *Kentucky*,

183 U. S. 503, it is stated at page 510 of the Court's opinion:

> "* * * the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

The case cited in the briefs of appellants in no way sustain their contentions that these appellees are without right to bring this suit. In all of the cases cited either a right of action was asserted by a party against whom no order was made or the action of the Commission was construed as not requiring affirmative action by anyone. Thus, in *Moffat Tunnel League et al.* v. *United States et al.*, 289 U. S. 113, the court held that the title plaintiff and other voluntary welfare associations and organizations had no right to bring a suit to challenge the validity of an order not in any manner directed against them. At page 120 the court said:

> "The case is utterly unlike *Chicago Junction Case*, 264 U. S. 258, 267; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and *Claiborne-Annapolis Ferry* v. *United States*, 285 U. S. 382. In each of these a carrier brought suit to set aside an order of the Commission. No question of its capacity to sue was involved. The order assailed directly affected its transportation business."

In *Pittsburgh & West Virginia Railway Company* v. *United States et al.*, 281 U. S. 479, the Pittsburgh & West Virginia Railway Company was held to be without right to challenge an order of the Interstate Commerce Commission granting to another railway company a certificate of public convenience and necessity to abandon one

of its stations and to use instead the facilities of a terminal established by other companies at Cleveland, Ohio. The court said of the Pittsburgh & West Virginia Railway Company, at page 487:

> "Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it is as carrier."

Likewise, in *Alexander Sprunt & Sons, Inc., et al.* v. *United States,* 281 U. S. 249, a party against whom the order of the Commission complained of was not directed, and who was by such order required to do nothing, was held to have no right of action although such order incidentally affected its business.

To the same effect is the opinion of this Court in *Edward Hines Yellow Pine Trustees, et al.* v. *United States, et al.,* 263 U. S. 143, where a party against whom the order of the Commission was not directed, and who was only incidentally affected by the operation of that order, was held to have no independent right to bring a suit in its own behalf to test the legality of such order.

A very different situation, however, is presented to the Court in this proceeding. The parties challenging the order of the Commission are the parties against whom such order is directed. They are the parties who must obey such order unless its operation be stayed, and the damages which they will suffer are the direct result of such order, not of the independent setting up of any competitive agency by the Government or any other party.

Appellants also refer to the cases of *United States, et al.* v. *Los Angeles & Salt Lake Railroad Company,* 273 U. S. 299, and *The Delaware and Hudson Company, et al.* v. *United States, et al.,* 266 U. S. 438, in which proceedings final and tentative valuations of the properties

of such companies were challenged by such companies. These cases do not support appellants' contentions as they involved no affirmative orders of the Commission. In the latter case the court said at page 448:

> "The 'tentative valuation' of the statute is no more than an *ex parte* appraisement without probative effect."

In the former case the court likewise held the so-called order of the Commission involved no affirmative requirement and at page 312 said:

> "Nor does the fact that 'all final valuations * * * and the classifications thereof' are made *prima facie* evidence prevent the report from being solely an exercise of the function of investigation."

In fact, the clear distinction between the orders involved in the two valuation cases referred to and the order of the Commission before the Court here is made in *United States* v. *Los Angeles & Salt Lake Railroad Company, supra,* at page 309, where the court says:

> "The final report on value, like the tentative report is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438. For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then

disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, Secs. 2-7, 34 Stat. 584, 586-595. The first suit to set aside an order was brought soon after. *Stickney* v. *Interstate Commerce Commission*, 164 Fed. 638; 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making."

The order of the Commission complained of in this case constitutes an exercise of its rate-making and rule-making power as defined in *United States* v. *Los Angeles & Salt Lake Railroad Company, supra*, and the right of these appellees, against whom the order of the Commission is directed, to challenge such order when made under circumstances amounting to a denial of due process of law cannot be questioned.

The affidavits filed in this proceeding by appellees clearly sustain their allegation of damages. They show the diversion of traffic which would result from their compliance with the Commission's order requiring them to become the unwilling partners of the American Barge Line Company. The affidavits also show the extent to which the earnings of appellees will be depleted under said order even as to the traffic which they handle jointly with the Barge Line. Thus, in the affidavit of S. C.

Mathews (R. 6869) it is shown that on traffic from Memphis to Boston the earnings of the rail lines under the maximum joint rail and water rate will be 8.1c per 100 pounds less than under the all rail rate maintained by appellees. Appellees have thus been damaged both by diversion of traffic and by volume of earnings on traffic handled by them jointly with the Barge Line by the affirmative order of the Commission directed against them, which order constitutes an exercise by the Commision of its rate-making and rule-making power and may properly be challenged by them.

Appellees have exhausted their remedies before the Commission to stay its order and can only be protected from irreparable injury through the process of a court of equity. Section 3(e) as interpreted and enforced by the Commission would require appellees to maintain and observe the maximum rates prescribed during the pendency of the subsequent hearing contemplated by the statute, and no recoupment of any damage so suffered is provided for by the statute, nor in fact would it be possible to provide for such recoupment if the Commission subsequently determined that it erred in its first order.

In similar cases the courts have held injunctions may properly issue. Principal among such cases is *Pendergast* v. *New York Telephone Company*, 262 U. S. 43, involving an order of the Public Service Commission of New York fixing telephone rates pending final investigation and determination of the matter by the Commission. An injunction against such order issued by the District Court was upheld by the United States Supreme Court, that court saying at page 49 of its opinion:

> "Nor did the fact that the orders of the Commission merely prescribe temporary rates to be effec-

tive until its final determination, deprive the Company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

To the same effect is the decision of the Supreme Court in *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, where at page 45, the court states:

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings."

Similarly in *Indiana General Service Co.* v. *McCardle*, 1 Fed. Sup. 113, the temporary order of the Indiana Public Service Commission was enjoined where such order was made effective by the Commission pending final investigation and determination of the matter before it. In the opinion of the three-judge District Court it is stated as follows at page 116:

"If the schedule of rates, as provided in such emergency order, becomes effective, pending final hearing, it prima facie will deprive plaintiff of its property without due process of law, and deny to it the equal protection of the law in violation of the

Fourteenth Amendment to the Constitution of the United States. The injury to plaintiff will be certain and irreparable, unless an interlocutory injunction is issued. If plaintiff is compelled to accept the rates as fixed by the emergency order of the commission, there is no way by which it can be reimbursed in the event the commission should finally determine that such reduction is excessive."

IX.

BY REASON OF THE REFERENCE TO SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT FOUND IN SECTION 3 (e) OF THE INLAND WATERWAYS ACT, SAID SECTION 3 (e) MIGHT BE CONSTRUED SO AS TO SAVE ITS CONSTITUTIONALITY.

While there is little doubt that Congress in Section 3 (e) of the Inland Waterways Act as amended, intended to dispense with the necessity of hearings prior to the entry and enforcement of orders requiring joint rail and water rates, and that such intent of the Congress was properly interpreted by the Interstate Commerce Commission, it is suggested by appellees that Section 3 (e) may, in view of the language in the section itself, notwithstanding this intention of Congress, be given an interpretation which will preserve its constitutionality.

It is of course true that no canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, *Ann Arbor R. R. Co.* v. *United*

States, 281 U. S. 658. *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14.

Section 3 (e) provides that after any person, firm, or corporation, including the Inland Waterways Corporation, shall obtain a certificate of public convenience and necessity in accordance with the provisions of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission "shall thereupon by order direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations and practices as provided in Paragraph 3 of Section 15 of the Interstate Commerce Act as amended * * *." Thus the Commission is directed to require these routes and joint rates in accordance with the provisions of Paragraph 3 of Section 15 of the Interstate Commerce Act, which section requires that such action of the Commission be taken "after full hearing." Section 3 (e) might therefore be construed as requiring the same procedure in the establishment of joint rail and water rates as is contemplated by Paragraph 3 of Section 15.

CONCLUSION.

In this proceeding appellees secured in the court below an injunction restraining the enforcement against them of an order of the Interstate Commerce Commission made without hearing, on the grounds of its unconstitutionality. Appellants before this court substantially concede the unconstitutionality of an order made in such manner, but seek to sustain the order upon the theory that by pursuing a certain procedure these appellees might have obtained a hearing before the Commis-

sion. That appellees would have obtained such a hearing is negatived by the language of the statute and by the interpretation placed upon it by the Commission. The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by the Act of May 29, 1928, c. 891, sec. 2 (e), 45 Stat. 978, (U. S. Code, Title 49, Sec. 153 (e)), provides as follows:

"Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of this title, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equi-

table divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this section; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."